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Thangaraj a/l Manirajee v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIRMINAL APPEAL NOS P-05–235–08 OF 2011, P-05–236–08 OF 2011 AND P-05–237–08 OF 2011

ABU SAMAH, ROHANA YUSUF AND HAMID SULTAN JJCA

26 MAY 2014

Criminal Law — Defence — Intoxication — Test — Provocation — Whether deceased provoked appellants by uttering the word 'Pariah' — Deceased unarmed and brutally beaten by appellants — Whether defence unsuccessful

Criminal Law — Murder — Appeal — Appeals against conviction and sentence — Deceased hit in the head with a helmet after a quarrel — Whether appellants were intoxicated — Whether appellants no intention to kill — Whether sudden fight — Whether deceased provoked appellants by uttering the word 'Pariah' — Whether inference of hitting of deceased on the head properly made — Whether motive established — Whether discrepancies in evidence of prosecution witness rendered witness unreliable — Whether failure to give due consideration to defence — Whether conviction safe — Penal Code ss 34 & 302

Evidence — Witness — Credibility of — Murder charge — Whether discrepancies in evidence of prosecution witness rendered witness unreliable — Whether immaterial minor discrepancies acceptable — Whether thrust of prosecution's case affected

The three appellants and SP5 had had drinks at a disco. They left the disco at about 4am when they were drunk. Outside the disco, the first appellant had a quarrel and then a scuffle with the deceased. SP5 and the appellants then got into their car and drove off. At a traffic light the deceased hailed to stop the car. The first appellant stopped the car. The second and third appellants caught the deceased and placed him in the back seat of the car. The first appellant then drove back to the car park of the disco where the scuffle took place earlier. Somehow the deceased escaped from the car. The second and third appellants gave chase and caught the deceased. SP5 testified that he saw the third appellant hitting the deceased a few times. This was followed by the first appellant, who had by then gotten out of the car, took the helmet from the third appellant and hit the deceased with the helmet twice. When the deceased fell to the ground, all the three appellants came back into the car. In the car the first appellant told SP5 in Tamil that there was blood discharging from the

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deceased's ear. SP5 testified that despite being drunk and was a little dizzy he was aware and could clearly see what had happened. SP5 said that The three appellants and SP5 had had drinks at a disco. They left the disco at about 4am when they were drunk. Outside the disco, the first appellant had a quarrel and then a scuffle with the deceased. SP5 and the appellants then got into their car and drove off. At a traffic light the deceased hailed to stop the car. The first appellant stopped the car. The second and third appellants caught the deceased and placed him in the back seat of the car. The first appellant then drove back to the car park of the disco where the scuffle took place earlier. Somehow the deceased escaped from the car. The second and third appellants gave chase and caught the deceased. SP5 testified that he saw the third appellant hitting the deceased a few times. This was followed by the first appellant, who had by then gotten out of the car, took the helmet from the third appellant and hit the deceased with the helmet twice. When the deceased fell to the ground, all the three appellants came back into the car. In the car the first appellant told SP5 in Tamil that there was blood discharging from the deceased's ear. SP5 testified that despite being drunk and was a little dizzy he was aware and could clearly see what had happened. SP5 said that he was not able to stop the appellants from beating the deceased because he had no energy to follow them. The post-mortem showed that the cause of death was severe head injury due to blunt trauma to the head consistent with the injury caused by a blunt object. The three appellants were charged under s 302 read together with s 34 of the Penal Code for the murder of the deceased. The appellants in their defence claimed that (a) they were drunk that night and did not realise that their actions would cause the death of the deceased; (b) they had no intention, nor any plan to kill the deceased; (c) the fight between them and the deceased was a sudden fight and not planned; (d) the first appellant hit the deceased because of provocation from the deceased who uttered the word 'Pariah' to the first appellant when he was drinking beer with his friends that night; and (e) they did not hit the head of the deceased but only hit the hands and legs of the deceased. The appellants were found guilty and convicted and sentenced to death. The appellants appealed against their conviction and sentence on the grounds that (i) in accepting the evidence of SP5 the learned trial judge ('the judge') made no finding on the state of mind of SP5 who was drunk at the time of incident; (ii) there were discrepancies in SP5's testimonies and the identification made by PW5 was doubtful; (iii) there was no explanation on why four separate statements were taken from PW5 by the police; and (iv) the judge did not give due consideration to the defence.

Held, dismissing the appeals and affirming the convictions and sentence:

(1) The judge had made a correct inference of the hitting of the deceased on the head. This inference was supported by the injury suffered by the deceased (see para 19).

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(2) The evidence and narration of SP5 was tested and analysed in the light of other supporting evidence such as the helmet used in the crime. The pathologist's finding was in line with the use of helmet (see para 24).

(3) There was also motive for causing death. Before the incident SP5 saw the first appellant in a scuffle with the deceased. After they caught hold of the deceased the first appellant drove back to the place where the scuffle took place. The first appellant apparently wanted to teach the deceased a lesson (see para 24).

(4) There appeared to be some discrepancies in the evidence of SP5. It is accepted that discrepancies amongst witnesses do occur, as powers of observation, expression and memory are not the same and honest differences in what could be remembered are possible. However in weighing the evidence before the court, it is important to note the main thrust of the case and not the little details. Furthermore, the fact that there are discrepancies in the testimony of a witness does not ipso facto an unreliable witness (see para 26).

(5) The highlighted discrepancies were not material or central to the case of the prosecution. The question that needed to be asked was whether the discrepancies would affect the thrust of the prosecution's case. In this case, the facts on how the appellants arrived, whether by car or motorbike or in which position the sitting in the car was not central to the charge of murder. They did not detract from the fact that the appellants had hit the deceased to death (see para 27).

(6) No evidence was elicited during the trial to establish the proposition that SP5 was asked to give four separate statements to the police because of SP5's state of intoxication. The appellants had ample opportunity during the trial to draw the attention of the judge on this issue but did not do so. The investigation officer and other police witnesses were never questioned (see para 29).

(7) The defence that the appellants had no intention to kill and they only beat the deceased on the hands and legs and not on the head was an afterthought as it was never raised in the prosecution's case earlier. Such a defence does not accord much weight. The defence was unbelievable and was a mere fabrication after the prosecution's case was made out (see para 33).

(8) The judge had considered the defence of intoxication applying the test in *Kenneth Fook Mun Lee v Public Prosecutor* [2007] 2 MLJ 130. He found that defence inapplicable to the defence in the light of the facts (see para 34).

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(9) The judge had considered the defence of grave and sudden provocation when SP5 testified that the first appellant told him why they quarreled was because the deceased addressed the first appellant as 'Hindu Phariah'. The judge applied the correct test in *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251. That defence was not met by the appellants. There was no provocation by the deceased. The deceased was unarmed and he was brutally beaten by the appellants (see para 35).

[Bahasa Malaysia summary

Ketiga-tiga perayu dan SP5 telah minum arak di sebuah disko. Mereka meninggalkan disko lebih kurang pukul 4 pagi dalam keadaan mabuk. Di luar disko itu, perayu pertama telah bertengkar dan kemudian bergaduh dengan si mati. SP5 dan perayu-perayu kemudian telah masuk ke dalam kereta mereka dan memandu dari situ. Di lampu isyarat si mati telah menahan untuk kereta diberhentikan. Perayu pertama telah menghentikan kereta. Perayu-perayu kedua dan ketiga menangkap si mati dan meletaknya di tempat duduk belakang kereta itu. Perayu pertama kemudian telah memandu balik ke parkir kereta disko di mana pergaduhan yang sebelum itu berlaku. Walaubagaimanapun si mati berjaya melepaskan diri daripada kereta itu. Perayu-perayu kedua dan ketiga telah mengejar dan menangkap si mati. SP5 telah memberi keterangan bahawa dia melihat perayu ketiga memukul si mati beberapa kali. Ini telah diikuti oleh perayu pertama, yang mana pada masa itu telah keluar daripada kereta, mengambil topi keledar daripada perayu ketiga dan memukul si mati dengan topi keledar itu sebanyak dua kali. Apabila si mati jatuh ke tanah ketiga-tiga perayu kembali masuk ke dalam kereta. Dalam kereta perayu pertama memberitahu SP5 dalam bahasa Tamil bahawa terdapat darah keluar daripada telinga si mati. SP5 memberi keterangan bahawa meskipun mabuk dan berasa pening sedikit dia sedar dan dapat melihat dengan jelas apa yang berlaku. SP5 mengatakan bahawa dia tidak dapat menahan perayu-perayu daripada memukul si mati kerana dia tiada tenaga untuk mengikut mereka. Post-mortem menunjukkan bahawa sebab kematian adalah kecederaan kepala yang teruk akibat daripada trauma dan sesuatu yang tumpul di kepala yang konsisten dengan kecederaan yang disebabkan oleh objek tumpul. Ketiga-tiga perayu telah dituduh di bawah s 302 dibaca bersama s 34 Kanun Keseksaan kerana membunuh si mati. Perayu-perayu dalam pembelaan mereka mendakwa bahawa: (a) mereka mabuk pada malam itu dan tidak menyedari yang tindakan mereka akan menyebabkan kematian si mati; (b) mereka tiada niat, mahupun apa-apa rancangan untuk membunuh si mati; (c) pergaduhan antara mereka dan si mati adalah pergaduhan tiba-tiba dan tidak dirancang; (d) perayu pertama memukul si mati kerana provokasi daripada si mati yang mengatakan perkataan 'Pariah' kepada perayu pertama apabila dia sedang minum bir dengan kawan-kawannya malam itu; dan (e) mereka tidak memukul kepala si mati tetapi hanya memukul tangan dan kaki si mati. Perayu-perayu didapati bersalah dan disabitkan dan dijatuhkan hukuman mati. Perayu-perayu telah merayu terhadap sabitan dan hukuman mereka atas

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alasan bahawa: (i) dalam menerima keterangan SP5 hakim perbicaraan yang bijaksana ('hakim itu') tidak membuat penemuan tentang keadaan minda SP5 yang mabuk pada masa kejadian; (ii) terdapat percanggahan dalam keterangan SP5 dan pengecaman yang dibuat oeh PW5 adalah diragui; (iii) tiada penjelasan berhubung kenapa empat kenyataan berasingan diambil daripada PW5 oleh polis; dan (iv) hakim tidak memberikan pertimbangan sewajarnya kepada pembelaan.

Diputuskan, menolak rayuan-rayuan dan mengesahkan sabitan-sabitan dan hukuman:

(1) Hakim telah membuat inferens berhubung kesan pukulan di kepala si mati. Inferens ini disokong dengan kecederaan yang dialami oleh si mati (lihat perenggan 19).

(2) Keterangan dan penceritaan SP5 diuji dan dianalisis berdasarkan keterangan sokongan lain seperti topi keledar yang digunakan dalam jenayah itu. Penemuan ahli patalogi adalah selari dengan penggunaan topi keledar itu (lihat perenggan 24).

(3) Terdapat juga motif kerana menyebabkan kematian. Sebelum kejadian itu SP5 melihat perayu pertama dalam pergaduhan dengan si mati. Selepas mereka berjaya menangkap si mati perayu pertama memandu semula ke tempat di mana pergaduhan itu berlaku. Perayu pertama jelas hendak mengajar si mati (lihat perenggan 24).

(4) Jelas terdapat beberapa percanggahan dalam keterangan SP5. Adalah diterima bahawa percanggahan itu antara saksi-saksi ada berlaku, kerana kuasa penelitian, ungkapan dan ingatan tidak sama dan perbezaan sebenar dengan apa yang boleh diingat adalah kemungkinan. Walau bagaimanapun dalam mengimbangi keterangan di hadapan mahkamah, adalah penting untuk meneliti teras utama kes ini dan bukan butiran-butiran kecil. Tambahan pula, fakta bahawa terdapat percanggahan dalam keterangan saksi tidak *ipso facto* saksi yang tidak boleh dipercayai (lihat perenggan 26).

(5) Percanggahan yang dikemukakan tidak material atau penting untuk kes pendakwaan. Persoalan yang perlu adalah sama ada percanggahan itu akan menjejaskan teras kes pendakwaan. Dalam kes ini, fakta tentang bagaimana perayu-perayu tiba, sama ada dengan kereta atau motorsikal atau kedudukan dalam kereta tidak penting kepada pertuduhan membunuh. Ia tidak menyimpang daripada fakta bahawa perayu-perayu telah memukul si mati sehingga mati (lihat perenggan 27).

(6) Tiada keterangan yang dibangkitkan sepanjang perbicaraan untuk membuktikan cadangan bahawa SP5 diminta untuk memberikan empat kenyataan berasingan kepada polis kerana keadaan SP5 berada dalam keadaan mabuk. Perayu-perayu mempunyai peluang yang mencukupi

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sepanjang perbicaraan untuk menarik perhatian hakim tentang isu ini tetapi tidak berbuat demikian. Pegawai penyiasat dan saksi-saksi polis yang lain tidak pernah disoal (lihat perenggan 29).

(7) Pembelaan bahawa perayu-perayu tidak mempunyai niat untuk membunuh dan mereka hanya memukul si mati di tangan dan kaki dan bukan di kepala adalah suatu yang telah difikirkan kemudian kerana ia tidak pernah dibangkitkan dalam kes pendakwaan sebelum ini. Pembelaan sebegitu tidak mempunyai. Pembelaan itu sukar dipercayai dan hanya pemalsuan selepas kes pendakwaan dibuat (lihat perenggan 33).

(8) Hakim telah mempertimbangkan pembelaan berkeadaan mabuk dengan mengguna pakai ujian dalam kes *Kenneth Fook Mun Lee v Public Prosecutor* [2007] 2 MLJ 130. Beliau mendapati pembelaan itu tidak boleh terpakai kepada pembelaan berdasarkan fakta tersebut (lihat perenggan 34).

(9) Hakim itu telah mempertimbangkan pembelaan untuk provokasi serius dan tiba-tiba apabila SP5 memberi keterangan bahawa perayu pertama memberitahunya kenapa mereka bergaduh adalah kerana si mati mengatakan perayu pertama sebagai 'Hindu Pariah'. Hakim mengguna pakai ujian yang betul dalam kes *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251. Pembelaan itu tidak terpakai kepada perayu-perayu. Tiada provokasi oleh si mati. Si mati tidak bersenjata dan telah dipukul dengan kejam oleh perayu-perayu (lihat perenggan 35).]

Notes

For a case on intoxication, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) para 999.

For cases on appeal, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1544–1559.

For cases on credibility of witness, see 7(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 3152–3206.

Cases referred to

Alcontara a/l Ambrose Anthony v PP [1996] 1 MLJ 209, FC (refd)
Chu Tak Fai v PP [1998] 4 MLJ 246; [1998] 4 AMR 3545, CA (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)
Kenneth FookMun Lee v PP [2007] 2 MLJ 130; [2006] 4 CLJ 359, FC (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251; [1988] 1 CLJ (Rep) 162, SC (refd)
Mohamed Alias v PP [1983] 2 MLJ 172; [1981] LNS 200 (refd)
PP v Amran bin Ismail [1992] 2 CLJ 787, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)

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Legislation referred to

Penal Code ss 34, 300, Exception 4, 302

Appeal from: Criminal Trial No 45–33 of 2009 (High Court, Pulau Pinang)

K Kumaraendran (Kumar & Co) for the first appellant.
Kitson Foong (Ahmad Zaidi & Partners) for the second appellant.
Harpal Singh Gill (Harpal Singh & Co) for the third appellant.
Samihah bt Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] The three appellants were charged and convicted under s 302 read together with s 34 of the Penal Code for the murder of one, Faiel bin Mat ('the deceased'). The appeals before us namely, No P-05–235–08 of 2011 by the first appellant Thangaraj a/l Manirajee, No P-05–236–08 of 2011 by the second appellant Sivasundram a/l Rajan and No P-05–237–08 of 2011 by the third appellant Visvanathan a/l Vadiveloo are against their convictions and death sentence imposed by the High Court of Pulau Pinang.

FACT OF THE CASE

[2] The prelude to the murder was narrated by SP5. His story began with him having drinks with his brother at their mother's house. The three appellants and another, called 'Beta', joined them at about 2am on 3 October 2008. On the suggestion of the first appellant, they decided to go to a disco known as 'SH Bistro Dangdut' ('Bistro') at Sungai Ara Penang. SP5 and the second appellant went in the first appellant's car. The third appellant rode on SP5's motorcycle wearing a helmet belonging to SP5 (P15A).

[3] They went into the Bistro with two bottles of Chivas. They drank until they were drunk and decided to leave the Bistro around 4am. The first appellant came out of the Bistro first followed by SP5, the second and the third appellants. When SP5 came out of the Bistro, he saw the first appellant talking to a Malay man (later identified as the deceased) at the car park. SP5 did not know the deceased. SP5, Beta, the second and third appellants then went to a restaurant nearby (Restoran Dinas) and waited for the first appellant. After about 10 minutes, SP5 requested Beta to go and look for the first appellant. Beta returned to inform them, that the first appellant was quarrelling with the deceased. SP5 together with the second and third appellants immediately went to the car park and saw the first appellant scuffling with the deceased. A crowd of people surrounded them. The scuffling stopped shortly after.

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[4] SP5 and the three appellants then went into the first appellant's car and drove off. The first appellant drove the car while the second appellant was in the front seat and both SP5 and the third appellant were in the back seat. At a traffic light the deceased hailed to stop the car. The first appellant told everyone in the car that, that was the deceased he had a scuffle with earlier and that he was carrying a machete (parang). The first appellant stopped the car and told the second and the third appellants to apprehend the deceased. Both the second and third appellants caught the deceased and placed him in the back seat of the car in between SP5 and the third appellant.

[5] The first appellant then made a U-turn and drove back to the car park of the Bistro where the scuffle took place earlier. Somehow the deceased escaped from the car. The first appellant told the second and third appellants to give chase. Both the second and third appellants ran after the deceased and caught him at the five-foot way of the shops along the Bistro. SP5 saw the third appellant hitting the deceased a few times. This was followed by the first appellant, who had by then gotten out of the car, took the helmet from the third appellant and hit the deceased with the helmet twice. When the deceased fell to the ground, all the three appellants came back into the car.

[6] In the car the first appellant told SP5 in Tamil that there was blood discharging from the deceased's ear.

[7] SP5 testified that despite being drunk and was a little dizzy he was aware and could clearly see what had happened. SP5 said that he was not able to stop the appellants from beating the deceased because he had no energy to follow them.

[8] After the incident, they went to another restaurant to meet a friend of SP5 known as 'Apache' before returning to their respective homes. Beta did not follow them to the said restaurant.

[9] Meanwhile PW6 a nurse on duty at Hospital Pantai testified that on 3 October 2008, three Indian men informed her that there was an accident. The three Indian men then led PW6 and PW7 (an ambulance driver) to the scene. Upon arriving at the scene PW6 and PW7 suddenly realised that the three Indian men were nowhere to be seen. PW6 saw the deceased lying on the five-foot way with his head in the drain. PW6 found that the deceased had no pulse and was already dead by then.

[10] PW7 called the police. PW3 (Kpl Mohd Sapri bin Jusof) made the first information report ('P45') after receiving the call. A post-mortem conducted by PW12 confirmed the cause of death was severe head injury due to blunt

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trauma to the head 'whereby the injury on the head of the deceased was consistent with the injury caused by a blunt object.'

[11] The three appellants were arrested on the same date of the incident (3 October 2008). The police also arrested SP5 and 'Beta' for further investigation.

[12] The prosecution's case was led by 13 witnesses. At the end of the prosecution's case the learned trial judge found that prima facie was successfully established by the prosecution. It was also established that there was common intention in the commission of the crime. The learned judge ordered all three appellants to enter defence.

THE DEFENCE

[13] All the three appellants testified under oath. In defence they said:

(a) they were drunk that night and did not realise that their actions would cause the death of the deceased;

(b) they had no intention, nor any plan to kill the deceased;

(c) the fight between them and the deceased was a sudden fight and not planned;

(d) the first appellant hit the deceased because of provocation from the deceased who uttered the word 'Pariah' to the first appellant when he was drinking beer with his friends that night; and

(e) all the three appellants denied that they hit the head of the deceased which caused the death of the deceased but admitted that they have only hit the hands and legs of the deceased.

[14] The learned High Court judge found that the defence failed to cast reasonable doubt on the prosecution's case and convicted all the three appellants.

GROUNDS OF APPEAL

[15] Before us learned counsel for the first appellant, Dato' K Kumaraendran, Encik Kitson Foong for second appellant, and Encik Harpal Singh Gill for the third appellant raised three main complaints. First Dato' K Kumaraendran, who led the appellants' submission contended, that the learned High Court judge erred in his finding that a prima facie case was made out by the prosecution. Related to this issue, complaints were raised against the main witness of the prosecution, SP5 and they are these:

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(a) learned counsel contended that in accepting the evidence of SP5 the learned trial judge made no finding on the state of mind of SP5 who was drunk at the time of incident;

(b) there were discrepancies in SP5's testimonies and the identification made by PW5 was doubtful; and

(c) there was no explanation on why four separate statements were taken from PW5 by the police.

[16] Apart from the complaints raised against SP5, learned counsel for the second and third appellants (Encik Kitson Foong and Encik Harpal Singh) submitted that the learned judge failed or did not give due consideration to the defence raised by the appellants.

THE EVIDENCE OF SP5

[17] It is clear that the complaint on whether there is a prima facie case is centred on the evidence of SP5, on which the prosecution primarily rests its case. The learned trial judge in coming to a conclusion that there was a prima facie case relied much on SP5's testimony.

[18] Learned counsel Dato' K Kumaraendran submitted that in his testimony SP5 did not say that the first appellant had in fact hit the deceased on the head with helmet. Accordingly hitting on the head tantamount to inflicting injury or an assault, which is likely to cause death.

[19] From the testimony of SP5 in our perusal of the appeal records, we agree with the learned counsel that SP5 did not specially mentioned that the first and third appellants had hit the deceased on the head. SP5 states 'saya nampak Thangaraj (3rd appellant) memukul 2 kali kearah lelaki Melayu itu dengan helmet ...Tom (1st appellant) pula merampas helmet dari Thangaraj dan memukul lelaki melayu itu ... ' We agree with the finding of the learned judge that relying on this fact he had made a correct inference of the hitting of the deceased on the head. This inference was supported by the injury suffered by the deceased as testified by the medical evidence.

[20] It was also the contention of learned counsel for the first appellant that the credibility of SP5 is to be treated with suspicion as he was under heavy influence of alcohol and could not have possibly recalled the incident clearly. Learned counsel highlighted the following evidence to support this contention viz:

(a) PW5 drank 1 1/2 bottle of Chivas with his brother before leaving for the Bistro;

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(b) another two bottles of Chivas were brought to the Bistro where they finished them;

(c) PW5 said he was dizzy but not drunk. They finished the drink and 'walaupun saya mabuk saya masih berjalan lagi ... ' ; and

(d) the chemist report (P53) shows that PW5 had 20.6mg of ethyl alcohol in his blood taken four days later as disclosed in the 'senarai barang kes' (P50).

[21] Accordingly it was the submission of learned counsel for the appellants that, had the learned trial judge took into account the above evidence he would not have placed much reliance on the testimony of SP5. It was therefore the defence's argument that the failure of the learned trial judge to scrutinise and assess the evidence of SP5 and accordingly make a finding on the state of intoxication of SP5 was fatal to the prosecution's case.

[22] In our deliberation on this issue we are mindful that facts as found by the learned trial judge are within his exclusive jurisdiction unless there is a clear appealable error. Ample authorities often been cited in support of this preposition of law such as *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209. An appellate court has very limited scope when dealing with question of fact in where credibility of witnesses is involved.

[23] Our reading of the judgment of the learned trial judge revealed that the learned trial judge had appraised himself on a totality of evidence before him in concluding that a prima facie case was established. In the forefront of his mind he accepted that SP5 had drank. He was mindful of SP5's testimony that they had drank 'minum sampai air dah habis, kami mabuk' which he states clearly in his judgment. It was submitted by learned counsel that by SP5's own evidence, he was not able to stop the fight was because he had no energy to follow them. Learned counsel submitted that this fact shows that SP5 was too intoxicated and his narration should not be relied upon.

[24] Upon our closer examination of the judgment of the learned trial judge we find that the evidence and narration of SP5 was tested and analysed in the light of other supporting evidence such as the helmet used in the crime found at the scene by SP13. The pathologist's finding by SP12 (Dato' Dr Bhupinder Singh) was in line with the use of helmet when he opined the cause of death was 'severe head injury due to blunt trauma to the head'. There was also motive for causing death. Before the incident SP5 saw the first appellant in a scuffle with the deceased. SP5 said, when the deceased stopped the car, the first appellant told them that the deceased was carrying a machete (parang) whilst quarrelling and was in a scuffle with him earlier. In fact after they caught hold of the

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deceased the first appellant drove back to the place where the scuffle took place. The first appellant apparently wanted to teach the deceased a lesson.

[25] Learned counsel for the appellants next, highlighted some inconsistencies in the testimony of SP5 and contended that the learned trial court judge failed to address these discrepancies. The inconsistencies of SP5's testimony are these:

(a) there was inconsistency between the testimony of SP4 and SP5 as to how the three appellants and SP5 came to the scene when they were in a scuffle. SP4 said he saw the three friends of the first appellant arrived in a car. Whereas SP5 said when they came out of the Bistro he saw the first appellant with a Malay man. The second and third appellants then went to Restoran Dinas and Beta rode on a motorcycle. Later again he said he rode on a motorcycle with Beta; and

(b) another discrepancy highlighted by learned counsel was on the sitting position in the car. When the deceased escaped, the second and third appellants went after the deceased and later brought him back to the car where he was made to sit in between SP5 and the third appellant which implies that SP5 was in the back seat all the time, since he never moved out of the car. Whereas SP5 said that he was seated next to the first appellant in the front seat.

[26] We agree with learned counsel that there appear to be some discrepancies in the above highlighted evidence of SP5. It is accepted that discrepancies amongst witnesses do occur, as powers of observation, expression and memory are not the same and honest differences in what could be remembered are possible. However in weighing the evidence before the court, it is important to note the main thrust of the case and not the little details. Furthermore, the fact that there are discrepancies in the testimony of a witness does not ipso facto an unreliable witness (see *Mohamed Alias v Public Prosecutor* [1983] 2 MLJ 172; [1981] LNS 200).

[27] In this regard we agree with the learned DPP (Puan Samihah bt Rhazali) that the above highlighted discrepancies are not material or central to the case of the prosecution. The question that needs to be asked is whether the discrepancies would affect the thrust of the prosecution's case. In this case, the facts on how the appellants arrived, whether by car or motorbike or in which position the sitting in the car was is not central to the charge of murder. They do not detract from the fact that the three appellants had hit the deceased to death.

[28] The other issue raised in an attempt to discredit SP5 was in respect of his statement to the police. SP5 testified that in the space of seven days there were

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four statements taken from him by the police. Learned counsel questioned the need to take four separate statements from SP5. Accordingly, learned counsel contended there was no explanation as to why the crown witness should give four separate statements to the police. For that reason learned counsel put forth the suggestion that it must be because of SP5's state of intoxication.

[29] We find that this suggestion is purely speculative. Learned counsel elicited no evidence during the trial to establish this proposition. The appellants had ample opportunity during the trial to draw the attention of the learned trial judge on this issue but did not do so. The investigation officer and other police witnesses were never questioned. In fact there was practically no cross-examination of the investigation officer. We are in no position to speculate and at a further disadvantage as we do not have the audio video benefit of hearing or assessing the testimonies of witnesses, beside the cold print of the appeal records.

[30] Having appraised ourselves with issues raised by learned counsel on the credibility of SP5 we are satisfied that the learned judge in his ground of judgment had given his proper assessment on SP5's testimony. It is also clear that the learned judge did not take the evidence of SP5 in isolation but had considered the prosecution evidence as a whole in coming to a finding that a prima facie case was made out.

[31] We further note that while the appellants launched all their attack on the intoxicated state of SP5, the appellants also relied on the testimony of SP5 in presenting their defence. It was raised in the defence of the first appellant that SP5 testified; he was told by the first appellant that the deceased had provoked him by calling him names 'Hindu Phariah' which led him to beat the deceased. We will deliberate further on this in the foregoing paragraphs.

[32] We agree with the contention of learned counsel that there was no direct reference made by the learned judge on the state of intoxication of SP5. However, the judgment of the learned judge revealed that he had evaluated the evidence of SP5 in a totality of evidence before him before making a finding that a prima facie case was made out.

DEFENCE, WHETHER PROPERLY CONSIDERED

[33] Learned counsel argued that the learned trial judge failed to give due consideration on the defence raised by the appellants. Encik Kitson Fong stressed the point that the second appellant did not have intention to cause death and the court should invoke the Exception 4 to s 300 of the Penal Code, instead. We find this submission totally misplaced. In his ground of judgment the learned trial judge made it plain that the thrust of the defence case was that

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they have no intention to kill and they only beat him on the hands and legs and not on the head. The learned judge quite rightly pointed out that the said defence was an afterthought as it was never raised in the prosecution's case earlier. Such a defence does not accord much weight as decided in the case of *Alcontara a/l Ambrose Anthony v Public Prosecutor* [1996] 1 MLJ 209. The learned trial judge applied the right test in analysing and considering the defence case and found the defence unbelievable as they were mere fabrication after the prosecution's case was made out (see *Chu Tak Fai v Public Prosecutor* [1998] 4 MLJ 246; [1998] 4 AMR 3545, *Public Prosecutor v Amran bin Ismail* [1992] 2 CLJ 787).

[34] The learned trial judge had also considered a defence of intoxication applying the test in the Federal Court case of *Kenneth Fook Mun Lee v Public Prosecutor* [2006] 4 CLJ 359. He found this defence inapplicable to the defence in the light of the facts he listed out at pp 35–37 of the appeal records.

[35] The learned trial judge had considered the defence of grave and sudden provocation when SP5 testified that the first appellant told him why they quarrelled was because the deceased addressed the first appellant as 'Hindu Phariah'. We find the learned judge once again applied the correct test in analysing this defence applying the test in the Supreme Court case of *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] 1 CLJ (Rep) 162. He then deliberated at length as to why this defence is not met by the appellants. He reasoned out his finding was because there was no provocation by the deceased. The deceased was unarmed and he was brutally beaten by the appellants. We find no error committed by the learned trial judge both in law and facts in appraising the defence case. We have no reason to disturb a reasoned finding by the learned trial judge in the circumstances.

[36] Having given our utmost consideration to the grounds raised by the appellants in these appeals we are of the considered view that they are devoid of merits. The learned judge had meticulously considered the defence raised and was satisfied that all three appellants failed to cast any reasonable doubt on the prosecution's case. We are in agreement with the learned judge and we are satisfied that the learned judge had not misdirected himself to warrant appellate interference. We further find the convictions and sentences on all the appellants safe. We accordingly dismissed the appeals and affirm the convictions and sentence.

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Appeals dismissed and convictions and sentence affirmed.

Reported by Kanesh Sundrum